

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA <i>ex rel.</i> DAVID	:
HEISLER; and STATE OF NEW YORK <i>ex rel.</i>	:
DAVID HEISLER,	:
	:
Plaintiffs,	:
	:
- against -	:
	:
VNSNY CHOICE <i>et al.</i> ,	:
	:
Defendants.	:
-----	X 13 Civ. 4261(RA)(SN)
UNITED STATES OF AMERICA,	:
	:
Plaintiff-Intervenor,	:
	:
- against -	:
	:
VNS CHOICE; VNS CHOICE COMMUNITY CARE;	:
and VISITING NURSE SERVICE OF NEW YORK,	:
	:
Defendants.	:
-----	X

STIPULATION AND ORDER OF SETTLEMENT

This Stipulation and Order of Settlement (the “Stipulation” or “Agreement”) is entered into among the United States of America, by its attorney Joon H. Kim, Acting United States Attorney for the Southern District of New York (the “United States”), Defendants VNS Choice d/b/a VNSNY Choice, VNS Choice Community Care, and Visiting Nurse Service of New York (collectively, “VNS”), and David Heisler (“Relator”) (collectively, the “Parties”), through their authorized representatives.

WHEREAS, Visiting Nurse Service of New York (“VNSNY”) is a New York not-for-profit corporation, organized to provide home and community-based health care and supportive services, and VNSNY provides administrative support to its affiliated organizations, including VNS Choice and, until

VNS Choice Community Care's cessation of operations as a licensed home care services agency ("LHCSA") that served VNS Choice members, to VNS Choice Community Care;

WHEREAS, VNS Choice ("Choice") is a New York not-for profit corporation that administers managed health care plans available to residents of the New York City metropolitan area and certain upstate areas, and, in particular, administers a Managed Long Term Care Plan (the "Choice MLTCP") for Medicaid beneficiaries under which it arranges for health and long-term care services on a capitated basis pursuant to a Managed Long Term Care Partial Capitation Model Contract ("MLTCP Contract") with the New York State Department of Health ("DOH");

WHEREAS, VNS Choice Community Care ("Choice Community Care") is a New York not-for-profit corporation and, until January 2015, when it voluntarily relinquished its LHCSA license to DOH, furnished care management and home health care services to members of the Choice MLTCP, and Choice is the sole corporate member of Choice Community Care;

WHEREAS, VNS submitted or caused to be submitted to New York State's Medicaid Program claims for payment of a monthly capitation amount with respect to each member enrolled in the Choice MLTCP ("Capitation Payment") during the period relevant to the United States' investigation;

WHEREAS, on or about June 20, 2013, Relator filed a *qui tam* action in the United States District Court for the Southern District of New York, captioned *United States ex rel. Heisler et al. v. VNSNY Choice et al.*, No. 13 Civ. 4261 (RA)(SN), pursuant to the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3730(b), and the State False Claims Act, New York State Finance Law § 190(2) ("the Relator's Action");

WHEREAS, on or about January 6, 2014, the Relator filed an amended complaint in the Relator's Action ("the Relator's Amended Complaint");

WHEREAS, the MLTCP Contract executed by Choice, and as amended by the State of New York from time to time, sets forth various circumstances where Choice is required to disenroll MLTCP members, including, without limitation, circumstances where Choice knows that a member no longer resides in the service area, a member has been absent from the service area for a specified number of consecutive days, a member is hospitalized for 45 consecutive days or longer, a member is no longer eligible to receive Medicaid benefits, or a member is no longer eligible for the Choice MLTCP based on an assessment of the member's condition and service needs;

WHEREAS, Choice is also required to disenroll an MLTCP member, including, without limitation, after the member provides oral or written notification that the member requests to be disenrolled, or, by repeatedly refusing qualifying home and community-based long-term care services that are both medically necessary and authorized in the member's plan of care, effectively requests to be disenrolled by the member's course of conduct;

WHEREAS, on October 21, 2014, the United States, through the Office of the United States Attorney for the Southern District of New York, filed a Notice of Partial Intervention in the Relator's Action against VNS and filed a Stipulation and Order of Settlement to resolve allegations relating to the use of social adult day care centers ("SADCCs") to enroll members in the Choice MLTCP, which conduct is specifically described in the Stipulation and Order of Settlement ("SADCC Conduct");

WHEREAS, on October 21, 2014, the State of New York (the "State"), through the Medicaid Fraud Control Unit of the New York State Attorney General's Office, also filed a Notice of Partial Intervention in the Relator's Action against VNS and entered into a stipulation with VNS to resolve the State's claims relating to the SADCC Conduct;

WHEREAS, contemporaneously with the filing of this Stipulation, the United States, through the Office of the United States Attorney for the Southern District of New York, filed a Second Notice of Partial Intervention in the Relator's Action and filed a Complaint-In-Intervention (the "Government Complaint");

WHEREAS, the Government Complaint alleges that VNS submitted claims for Capitation Payments to which it was not entitled, and knowingly avoided reimbursing Medicaid for payments it had improperly received, by engaging in the following conduct: (a) failing to timely disenroll 365 Choice MLTCP members ("the 365 Ineligible Members") from January 1, 2011 to March 31, 2015, and improperly collecting Capitation Payments for the 365 Ineligible Members for the months following the date each member should have been disenrolled (the 365 Ineligible Members are identified in Exhibit A to this Stipulation)¹; and (b) with respect to some of the 365 Ineligible Members, failing to reimburse Medicaid for Capitation Payments after becoming aware that the members should have been disenrolled at an earlier date and that VNS was not entitled to these payments (the conduct in this paragraph is referred to below as the "Covered Conduct");

WHEREAS, the State of New York (the "State"), acting through the Medicaid Fraud Control Unit of the New York State Attorney General's Office, filed a second notice of partial intervention in the Relator's Action and its own complaint-in-intervention against VNS and contemporaneously herewith has entered into a stipulation with VNS to resolve the State's claims ("State Settlement");

¹ The names and any other identifying information of the 365 Ineligible Members are redacted in the version of the Stipulation that is filed on the Civil Docket to preserve the confidentiality of their identities pursuant to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA").

WHEREAS, Relator's share of the settlement will be subject to a separate agreement between Relator and the United States;

NOW, THEREFORE, in consideration of the mutual promises and obligations of this Stipulation, the Parties agree and covenant as follows:

1. The Parties consent to this Court's exercise of subject matter jurisdiction over this action and personal jurisdiction over each of them with respect to this action.

2. VNS admits, acknowledges, and accepts responsibility for the following conduct:

a. Choice failed to identify and disenroll the 365 Ineligible Members from the Choice MLTCP in a timely manner and, as a result, received Capitation Payments to which it was not entitled.

b. With respect to a number of the 365 Ineligible Members, Choice was aware at the time it ultimately disenrolled the members that the members should have been disenrolled earlier, but failed to repay Medicaid for the Capitation Payments that Choice had improperly received for those members.

3. Choice shall pay collectively to the United States and the State in connection with this Stipulation and the State Settlement the total sum of \$4,392,150.00, plus interest which shall be compounded annually at a rate of 2.25% accruing from June 6, 2017, to June 30, 2017 (the "Settlement Amount"). Choice shall pay to the United States the sum of \$1,756,860.00, plus interest which shall be compounded annually at a rate of 2.25% accruing from June 6, 2017, to June 30, 2017, representing the federal portion of the Settlement Amount (the "U.S. Settlement Amount"). Payment of the U.S. Settlement Amount shall be made from funds held by the State in the escrow account created pursuant to the escrow agreement, dated December 18, 2013, between the Medicaid Fraud Control Unit of the New York State Attorney General's Office and

Choice (the “Escrow Agreement” and the “Escrow Account,” respectively), which Escrow Account includes funds withheld by the Office of the Medicaid Inspector General from payments to Choice under the Medicaid program, pursuant to 18 NYCRR §§ 504.8(d) and 518.7 and 42 C.F.R. § 455.23, and funds paid by Choice to the State under the Escrow Agreement, pursuant to 42 C.F.R. § 455.23(e)(2). Choice consents to the U.S. Settlement Amount being paid from these funds. The State has informed the United States that it will forward the U.S. Settlement Amount to the United States within 10 business days of the Effective Date (as defined in Paragraph 27 below), and the State will be solely responsible for effecting such transfer.

4. VNS agrees to cooperate fully and truthfully with the United States’ investigation of individuals and entities not released in this Stipulation. Upon reasonable notice, VNS shall encourage, and agree not to impair, the cooperation of their directors, officers, and employees, and shall use its best efforts to make available, and encourage, the cooperation of former directors, officers, and employees for interviews and testimony, consistent with the rights and privileges of such individuals. VNS further agrees to furnish to the United States, upon request, complete and unredacted copies of all non-privileged documents, reports, memoranda of interviews, and records in its possession, custody, or control concerning any investigation of the Covered Conduct that it has undertaken, or that has been performed by another on its behalf.

5. Subject to the exceptions in Paragraph 7 (concerning excluded claims) below, and conditioned upon the United States receiving the U.S. Settlement Amount, the United States releases VNS, together with its predecessors, successors, and members, from any civil or administrative monetary claim the United States has for the Covered Conduct under the False Claims Act, 31 U.S.C. §§ 3729-3733, the Civil Monetary Penalties Law, 42 U.S.C. § 1320a-7a,

the Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801-3812, or the common law theories of payment by mistake, breach of contract, unjust enrichment, and fraud.

6. Conditioned upon full payment of the U.S. Settlement Amount and the amount Choice is required to pay to the State pursuant to the State Settlement, the Relator for himself and for his heirs, executors, administrators, estates, successors, attorneys, agents, and assigns, hereby fully, finally and irrevocably releases VNS and all of its predecessors, successors, and members, together with their respective current and former officers, directors, trustees, servants, employees, agents, affiliates, and assigns, from any and all rights, claims, expenses, debts, liabilities, demands, obligations, costs, damages, injuries, actions, and causes of action of every nature, whether known or unknown, suspected or unsuspected, in law or in equity, the Relator has asserted, could have asserted, or may assert in the future on behalf of the United States arising out of the allegations in the Relator's Action, including, without limitation, 31 U.S.C. §§ 3729-3733. However, nothing in this Stipulation shall preclude the Relator from seeking to recover his expenses or attorney's fees and costs from VNS, pursuant to 31 U.S.C. § 3730(d) and N.Y. State Fin. Law § 190(6)(a).

7. Notwithstanding the releases given in Paragraph 5 above or any other Paragraph of this Stipulation, the following claims of the United States are specifically reserved and are not released:

- a. Any liability arising under Title 26, U.S. Code (Internal Revenue Code);
- b. Any criminal liability;
- c. Except as explicitly stated in this Stipulation, any administrative liability, including permissive and mandatory exclusion from Federal health care programs;

d. Any liability to the United States (or its agencies) for any conduct other than the Covered Conduct;

e. Any liability based upon obligations created by this Stipulation and

f. Any liability of individuals.

8. The Relator and his heirs, successors, attorneys, agents, and assigns shall not object to this Stipulation but agree and confirm that this Stipulation is fair, adequate, and reasonable under all the circumstances, pursuant to 31 U.S.C. § 3730(c)(2)(B).

9. VNS waives and shall not assert any defenses it may have to any criminal prosecution or administrative action relating to the Covered Conduct that may be based in whole or in part on a contention that, under the Double Jeopardy Clause in the Fifth Amendment of the Constitution, or under the Excessive Fines Clause in the Eighth Amendment of the Constitution, this Stipulation bars a remedy sought in such criminal prosecution or administrative action. Nothing in this Paragraph or any other provision of this Stipulation constitutes an agreement by the United States concerning the characterization of the U.S. Settlement Amount for purposes of the Internal Revenue laws, Title 26 of the United States Code.

10. VNS and all of its predecessors, successors, and members, together with their respective current and former officers, directors, trustees, servants, employees, agents, affiliates, and assigns, fully and finally release the United States, and its agencies, officers, agents, employees, and servants, from any claims (including attorney's fees, costs, and expenses of every kind and however denominated) that VNS has asserted, could have asserted, or may assert in the future against the United States, and its agencies, officers, agents, employees, and servants, related to the Covered Conduct and the United States' investigation and prosecution thereof.

11. In consideration of the execution of this Stipulation by Relator and Relator's release as set forth in Paragraph 6 above, VNS and all of its predecessors, successors, and members, together with their respective current and former officers, directors, trustees, servants, employees, agents, affiliates, and assigns, hereby fully, finally, and irrevocably release Relator and his heirs, executors, administrators, estates, successors, attorneys, agents and assigns, from any and all rights, claims, expenses, debts, liabilities, demands, obligations, costs, damages, injuries, actions, and causes of action of every nature, whether known or unknown, suspected or unsuspected, in law or in equity, that they had, have, or may have, against Relator arising out of the Relator's Action and Relator's investigation and prosecution thereof.

12. VNS agrees to the following:

a. Unallowable Costs Defined: All costs (as defined in the Federal Acquisition Regulation, 48 C.F.R. § 31.205-47, and in Titles XVIII and XIX of the Social Security Act, 42 U.S.C. §§ 1395-1395kkk-1 and 1396-1396w-5, and the regulations and official program directives promulgated thereunder) incurred by or on behalf of VNS or its present or former officers, directors, trustees, employees, shareholders, and agents in connection with:

- (1) the matters covered by this Stipulation;
- (2) the United States' investigation(s) of the matters covered by this Stipulation;
- (3) VNS's investigation, defense, and corrective actions undertaken in response to the United States' investigation(s) in connection with the matters covered by this Stipulation (including attorney's fees);
- (4) the negotiation and performance of this Stipulation; and

- (5) the payment Choice makes to the United States pursuant to this Stipulation and any payments that VNS may make to the Relator, including for his costs and attorney's fees;

are unallowable costs for government contracting purposes and under the Medicare Program, Medicaid Program, TRICARE Program, and Federal Employees Health Benefits Program ("FEHBP") (hereinafter referred to as "Unallowable Costs").

b. Future Treatment of Unallowable Costs: Unallowable Costs shall be separately determined and accounted for in nonreimbursable cost centers by VNS, and VNS shall not charge such Unallowable Costs directly or indirectly to any contracts with the United States or any State Medicaid program, or seek payment for such Unallowable Costs through any cost report, cost statement, information statement, or payment request submitted by VNS or any of its member corporations, subsidiaries or affiliates to the Medicare, Medicaid, TRICARE, or FEHBP Programs.

c. Treatment of Unallowable Costs Previously Submitted for Payment: VNS further agrees that within 90 days of the Effective Date of this Stipulation it shall identify to applicable Medicare and TRICARE fiscal intermediaries, carriers, and/or contractors, and Medicaid and FEHBP fiscal agents, any Unallowable Costs (as defined in this Paragraph) included in payments previously sought from the United States, or any State Medicaid program, including, but not limited to, payments sought in any cost reports, cost statements, information reports, or payment requests already submitted by VNS or any of its member corporations, subsidiaries or affiliates, and shall request, and agree, that such cost reports, cost statements, information reports, or payment requests, even if already settled, be adjusted to account for the effect of the inclusion of the Unallowable Costs. VNS agrees that the United States, at a

minimum, shall be entitled to recoup from VNS any overpayment plus applicable interest and penalties as a result of the inclusion of such Unallowable Costs on previously-submitted cost reports, information reports, cost statements, or requests for payment. Any payments due after the adjustments have been made shall be paid to the United States pursuant to the direction of the Department of Justice and/or the affected agencies. The United States reserves its rights to disagree with any calculations submitted by VNS or any of its member corporations, subsidiaries, or affiliates on the effect of inclusion of Unallowable Costs (as defined in this Paragraph) on VNS's or any of its member corporations', subsidiaries' or affiliates' cost reports, cost statements, or information reports.

d. Nothing in this Stipulation shall constitute a waiver of the rights of the United States to audit, examine, or re-examine VNS's books and records to determine that no Unallowable Costs have been claimed in accordance with the provisions of this Paragraph.

13. This Stipulation is intended to be for the benefit of the Parties only. The Parties do not release any claims against any other person or entity except as provided in Paragraph 14 below.

14. VNS agrees that it waives and shall not seek payment for any of the health care billings covered by this Stipulation from any health care beneficiaries or their parents, sponsors, legally responsible individuals, or third party payors based upon the claims defined as Covered Conduct.

15. This Stipulation is governed by the laws of the United States. The exclusive jurisdiction and venue for any dispute relating to this Stipulation is the United States District Court for the Southern District of New York. For purposes of construing this Stipulation, this

Stipulation shall be deemed to have been drafted by all Parties to this Stipulation and shall not, therefore, be construed against any Party for that reason in any subsequent dispute.

16. Except as provided in Paragraph 6 above, each Party shall bear its own legal and other costs incurred in connection with this matter, including the preparation and performance of this Stipulation.

17. Each Party and signatory to this Stipulation represents that it freely and voluntarily enters into this Stipulation without any degree of duress or compulsion.

18. This Stipulation constitutes the complete agreement between the Parties with respect to the subject matter hereof. This Stipulation may not be amended except by written consent of the Parties.

19. The undersigned counsel and other signatories represent and warrant that they are fully authorized to execute this Stipulation on behalf of the persons and entities indicated below.

20. This Stipulation may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same Stipulation. Signatures delivered by facsimile transmission or as .pdf attachments to emails shall constitute acceptable, binding signatures for purposes of this Stipulation.

21. This Stipulation is binding on VNS's successors, transferees, heirs, executors, administrators, estates, and assigns.

22. This Stipulation is binding on Relator's successors, transferees, heirs, executors, administrators, estates, and assigns.

23. The Parties consent to the United States' disclosure of this Stipulation, and information about this Stipulation, to the public.

24. Upon receipt of the payment described in Paragraph 3 above and the payment Choice is required to make pursuant to the State Settlement, the United States and the Relator shall file pursuant to Rule 41(a)(1) a Joint Notice of Dismissal that will dismiss the Government Complaint and the Relator's Amended Complaint. As to the United States, the dismissal shall be with prejudice only as to claims related to the Covered Conduct that are being released pursuant to this Stipulation, and shall be without prejudice as to all other claims and conduct. As to the Relator, the dismissal shall be with prejudice as to all claims in the Relator's Amended Complaint, except for the Relator's claims for expenses, costs, and attorney's fees pursuant to 31 U.S.C. § 3730(d) and N.Y. State Fin. Law § 190(6)(a). However, the Court shall retain jurisdiction over this Stipulation to enforce obligations pursuant to Paragraph 4 above.

25. Any failure by the United States to insist upon the strict performance of any of the provisions of this Stipulation shall not be deemed a waiver of any of the provisions hereof, and the United States, notwithstanding that failure, shall have the right thereafter to insist upon strict performance of any and all of the provisions of this Stipulation.

26. Any notices pursuant to this Stipulation shall be in writing and shall, unless expressly provided otherwise herein, be given by hand delivery, express courier, or email followed by postage prepaid first class mail, and shall be addressed as follows:

TO THE UNITED STATES:

Jeffrey K. Powell
United States Attorney's Office
Southern District of New York
86 Chambers Street, 3rd Floor
New York, NY 10007
Telephone: (212) 637-2706
Email: Jeffrey.Powell@usdoj.gov

TO VISITING NURSE SERVICE OF NEW YORK, VNS CHOICE AND VNS CHOICE
COMMUNITY CARE:

Stephen A. Warnke, Esq.
Ropes & Gray LLP
1211 Avenue of the Americas
New York, NY 10036
Telephone: (212) 841-0681
Email: Stephen.Warnke@ropesgray.com

TO RELATOR:

Kathy S. Marks, Esq.
Yankwitt LLP
140 Grand Street, Suite 501
White Plains, NY 10601
Telephone: (914) 686-1500
Email: Kathy@Yankwitt.com

27. The effective date of this Stipulation is the date upon which this Stipulation is entered by the Court (the "Effective Date").

Dated: New York, New York
July 14, 2017

JOON H. KIM
Acting United States Attorney for the
Southern District of New York
Attorney for Plaintiff United States of America

By: Jeffrey Powell
JEFFREY K. POWELL
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Dated: July 11, 2017

VNS CHOICE

By: _____

Hany Abdelaal, DO
President

Dated: July 6, 2017

VISITING NURSE SERVICE OF NEW YORK

By: _____

Kerry Parker
Executive Vice President and General Counsel and
Risk Officer

Dated: July 11, 2017

VNS CHOICE COMMUNITY CARE

By: _____

Hany Abdelaal, DO
Chair

Dated: 7/6, 2017

ROPES & GRAY LLP
Attorneys for VISITING NURSE SERVICE OF
NEW YORK, VNS CHOICE, AND VNS CHOICE
COMMUNITY CARE

By:



STEPHEN A. WARNKE, ESQ.

Ropes & Gray LLP

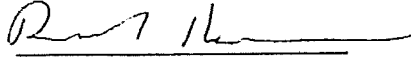
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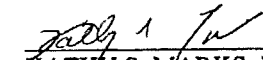
Email: Stephen.Warnke@ropesgray.com

Dated: July 6, 2017


DAVID HEISLER, Relator


Dated: July 10, 2017

YANKWITT LLP
Attorneys for Relator

By: 
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Email: Kathy@Yankwitt.com

Dated: July 7, 2017

LAW OFFICE OF ANDREA PAPARELLA, PLLC
Attorneys for Relator

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SO ORDERED:

July 14, 2017


HONORABLE RONNIE ABRAMS, U.S.D.J.